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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 879

ELBERT J. BURNS, Alias E. J. Burns,
Petitioner,

vs.

STATE OF ALABAMA.

MOTION FOR STAY OF EXECUTION OF JUDGMENT

G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
HORACE C. ALFORD,
All of Birmingham, Alabama,
Of Counsel for Petitioner.

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STATE OF ALABAMA

MOTION FOR STAY OF EXECUTION OF JUDGMENT

To the Honorable Justices of the Supreme Court of
the United States:

Now comes Elbert J. Burns by his counsel of record and makes known to the court the following facts:

1. Petitioner is a white male citizen of the State of Alabama and did on the 29th day of January, 1945, file in the Supreme Court of the United States his petition for Writ of Certiorari to the Supreme Court of the State of Alabama, to review a judgment of that court affirming the judgment of the Circuit Court of Jefferson County, Alabama, pursuant to which judgment your Petitioner now stands sentenced to death, and at the same time filed in this court his brief and argument in support of said petition for Writ of Certiorari, and filed a complete certified copy of the record of the cause in the Supreme Court of the State of Alabama.

2. Your Petitioner avers that the judgment sought to be reviewed was rendered by the Supreme Court of Alabama on

June 15th, 1944, that your Petitioner filed application for a re-hearing of said judgment which was overruled and denied by the Supreme Court of Alabama on November 2nd, 1944, and date of execution of your Petitioner fixed for January 12, 1945; your Petitioner further avers that his attorney, Horace C. Alford, did make known to the Chief Justice of the Supreme Court of Alabama his intention to seek a review in the Supreme Court of the United States, of said judgment, and did orally apply for a stay of execution pending a decision by the Supreme Court of the United States and was informed by the Chief Justice of the Supreme Court of Alabama that said court had considered the matter in conference and had instructed the Chief Justice to inform Horace C.Alford as counsel for Petitioner, that said application for stay of execution would be denied; your Petitioner further avers that his counsel of record in this court, O. Ernest Jones, conferred by long distance telephone with the Chief Justice of the Supreme Court of Alabama with regard to a stay of execution and was authorized by said Chief Justice of the Supreme Court of Alabama to say that Petitioner's application for stay of execution was denied and was informed by the Chief Justice that it would be useless to file formal written application to the Supreme Court of Alabama for such stay of execution, but that the court had already informally denied the same; and your Petitioner further avers that his counsel of record in this court (O. Ernest Jones) did inform the Governor of Alabama by letter of the informal denial of a stay of execution by the Supreme Court of Alabama, and the Governor of Alabama granted an executive reprieve postponing execution of the sentence of death upon your Petitioner from January 12, 1945 to February 16, 1945.

3. Your Petitioner further avers that he did on January 29, 1945, at the time of filing his petition for Writ of Certiorari as hereinbefore recited in paragraph 1 hereof, file his Motion for Leave to Proceed in Forma Pauperis in this court; and included therein on page 15 thereof a motion for an Order Suspending the Execution of the Sentence of Death imposed upon this Petitioner pending final decision by the Supreme Court of the United States in the Petitioner's proceeding for a Writ of Certiorari to the Supreme Court of Alabama; and your Petitioner attaches hereto and files herewith and incorporates herein at this point as fully as though here set out, a printed copy of said Motion for Leave to Proceed in Forma Pauperis.

4. In addition to the facts set out in the Motion for Leave to Proceed in Forma Pauperis (which said Motion was prepared prior to January 2nd, 1945, and before counsel of record in this court had fully considered the record), your Petitioner says that he was denied due process of law in the trial court below in the following additional particulars:-

(a) The trial judge arbitrarily refused to make any investigation with regard to the sanity of your Petitioner pursuant to the provisions of Sec. 488, Title 15, Code of Alabama, refusing to consider an affidavit of Horace C. Alford and Dora Burns (record pages 91½ and 92½), and constituting himself both judge and witness, basing his refusal to consider, or to make any investigation with regard to Petitioner's sanity, upon the judge's own personal knowledge of Petitioner without stating for the purpose of the record the facts within the knowledge of the Judge, (Record pages 90 to 93), and the Supreme Court of Alabama approved this procedure.

5. Your Petitioner verily believes that his petition for Writ of Certiorari is meritorious. He is advised by counsel and upon such advice believes the fact to be that he was denied that due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution;-

(a) in that the State of Alabama is about to carry into effect by the execution of this defendant in the electric chair a verdict rendered by a jury which under the Constitution and Laws of the State of Alabama was not legally constituted as a tribunal with authority under the Constitution of Alabama to consider and determine his guilt; that said jury was procured by a course of procedure which was so unfair, oppressive, discriminatory and unjust as to amount to a denial of the right of trial by a fair and impartial jury fairly and impartially selected;

(b) That the jury which found him guilty, upon which verdict he is to be executed, was selected pursuant to procedure authorized by Code of Alabama, 1940, Article 18, Title 62, Section 138, and Sections 205-228 inclusive, which laws discriminate against those persons who happen to be tried in the Circuit Court at Birmingham, Alabama, and the Circuit Court at Bessemer, Alabama, which discrimination violates the guarantee to the equal protection of the law to such persons or to due process of law, which guarantees are contained in the Fourteenth Amendment to the Federal Constitution, in that said laws set up an unfair, oppressive, discriminative procedure for the selecting and impaneling of a jury and deny to defendants on trial in capital cases in Jefferson County, Alabama, substantial rights given to such defendants on trial in

each of the other 66 counties of the State of Alabama, which discriminations against such defendants on trial in Jefferson County, Alabama, have no reasonable relation to any difference in circumstance or condition arising out of any condition pertaining to such defendants as against other defendants in other counties of the State;

(d) And your Petitioner says that he is about to be deprived of his life in the enforcement of the verdict of a tribunal (jury) selected, and impaneled by a procedure which is not only unfair, oppressive and discriminatory, but is the product of a revolutionary assumption of authority by the legislature of Alabama approved by the Supreme Court of Alabama, notwithstanding the express, emphatic, unequivocal and explicit terms of the denial of such power to the legislature of Alabama by Sections 45, 85, 105, 106 and 110 of the Constitution of the State of Alabama, and that Petitioner, about to suffer death as the result of such abandonment of a republican form of government by such legislative assumption of power denied to it by the people of the State of Alabama, in the Constitution of the State, appeals to this court for protection against an infringement upon the guarantee of a republican form of government contained in article 4, Section 4 of the Constitution of the United States.

(6) Your Petitioner has filed his brief and argument in support of his petition for Writ of Certiorari in this court and respectfully requests the Court to consider the aforesaid brief and argument as his brief and argument in support of this Motion for a Stay of Execution.

WHEREFORE, THE PREMISES CONSIDERED, your Petitioner respectfully moves the Court for an Order, Judgment, or Decree of the Court, staying execution of this Petitioner, now set for the 16th day of February, 1945, pending a decision of the Supreme Court of the United States upon your Petitioner's petition for Writ of Certiorari to the Supreme Court of the State of Alabama; and further moves the court for such Orders as may be necessary to cause the Supreme Court of Alabama to be legally notified of this court's action in the premises; and for all such other Orders, Judgments or Decrees as may be proper or necessary to cause the execution of the Judgment sought to be reviewed to be stayed pending this court's action in the premises; and your mover further prays for such other further general or special relief as may in the premises seem mete and proper, and your Petitioner will ever pray.

Respectfully submitted,

ELBERT J. BURNS

J. Ernest Jones,
Counsel for Petitioner.

Roderick Beddow

Horace C. Alford
Birmingham, Alabama,
of Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. .....

ELBERT J. BURNS, Alias E. J. BURNS,
Petitioner,

vs.

STATE OF ALABAMA.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

G. ERNEST JONES,
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Counsel for Petitioner.

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HORACE C. ALFORD,
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

To the Honorable Supreme Court of the United States:

In the above styled cause Petitioner respectfully represents to this Honorable Court the following existing facts and circumstances as a basis for his motion for leave to proceed on this review by Certiorari in forma pauperis, as is provided by law (Act of July 20, 1892, Chap. 290, Sec. 1, 27 St. at L. 252, as amended June 27, 1922, Chap. 246, 42 St. at L. 666, Comp. St., Sec. 1626, Fed. St. Anno. Suppl. 1922, p. 32, 28 U. S. C. A., Sec. 832):

First: Petitioner is a white male citizen of the State of Alabama. Petitioner owns no property of any kind, real, personal or mixed, and has no source of income, has no

money, and is unable to pay, or to give security for the payment of the costs of this proceeding. He was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama (Jefferson County) on July 6, 1943, charged with the offense of first degree murder. Petitioner was immediately arrested and imprisoned and was arraigned in open court on the 10th day of July, 1943, and entered his pleas "not guilty" and "not guilty by reason of insanity." Petitioner has been continuously incarcerated since that time. Petitioner's wife owns no property. Petitioner's wife was a witness against him in this prosecution and has no inclination arising out of the conjugal relation to aid and assist Petitioner in a pecuniary way. The attached affidavit of petitioner is referred to and it is requested that the same be considered in connection herewith.

Second: **The bona fides of the review here sought.** With the utmost good faith in the basis for a review, does the Petitioner here present his cause. He has been sentenced to death in the electric chair, and, verily a matter of life and death for this Petitioner is here involved, and the proceedings here sought to be instituted are not sought for any dilatory purpose. Petitioner firmly maintains his innocence; however, this is not the sole question to be presented by the petition for the writ of certiorari. In addition to maintaining his innocence the Petitioner contends honestly and in good faith that he was not a man of sound mind at the time of the trial of this case, nor was he a man of sound mind at the time of the alleged commission of the offense for which he has been sentenced to death, and that he was denied due process of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution in connection with the denial of his motion for an examination into his sanity pursuant to the Statutes of Alabama in such cases made and provided, in that the denial of said motion was an abuse of the dis-

cretion of the trial judge and was admittedly made upon uncommunicated facts within the alleged knowledge of the trial judge and not upon the basis of any evidence presented to the trial judge at the time his motion for such examination into his sanity was considered and determined; and, furthermore, Petitioner contends honestly and in good faith that he has been denied due process of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution, in that he did not receive that fair and impartial trial which is the essence of due process of law, and on account of the innumerable rulings of the trial court, injurious and prejudicial to an unbiased and impartial trial, and adhered to by him, some of which rulings were discretionary, but in the instant case amounted to an abuse of discretion, and some of which rulings were actually an invasion of his legal rights, such as commenting upon the failure of the defendant to take the witness stand, and the particular comment by the trial judge himself in the presence of the jury as to whether the defendant would take the witness stand.

Furthermore, he contends that he was denied due process of law in that he was denied the right to the benefits of the General Laws of the State of Alabama with reference to drawing, summonsing, impanelling and selection of a jury to try his case, or, in the alternative, was denied the equal protection of the law of the State of Alabama, as guaranteed to him by the 14th Amendment to the Federal Constitution in this respect. Furthermore, he contends that the arbitrary ruling of the Supreme Court of Alabama holding that, notwithstanding the express terms of the the Constitution of the State of Alabama, the Legislature of Alabama made and enacted a local law without a compliance with the constitutional limitations upon the power of the Legislature of Alabama to enact local legislation, was an arbitrary ruling, contrary to the express terms of the Constitution, contrary to the organic law of the State of

Alabama, founded on no sound judicial reason, and amounted to a condonation on the part of the Supreme Court of Alabama of a tyrannical exercise of power by the Legislature of Alabama in defiance of the organic law of the State of Alabama, and was tantamount to an abandonment of a Republican form of Government and infringed upon the right of the people of the State of Alabama, and this petitioner, in particular, to be governed by a representative form of Government under and pursuant to the organic law of the State of Alabama, ordered by the people of Alabama acting through their duly chosen representatives and at the polls, thus infringing upon the guarantee contained in Section 4, Article IV, of the Constitution of the United States, viz., "**The United States shall guarantee to every State in the Union a Republican form of Government.**" And your Petitioner further says that without the above and foregoing infringements of his rights during the course of the trial he would not have been convicted and sentenced to death. And your Petitioner says that the Federal questions hereinbefore presented were presented to the Supreme Court of Alabama and adversely decided.

Third: **The jurisdictional basis for this review is stated as follows:**

(1) The statutory provisions sustaining the jurisdiction is contained in Judicial Code, Sec. 237-b, as amended by Act of February 13, 1925, 43 Stat. 937.

(2) The writ is properly addressed to the Supreme Court of Alabama, that being the court of last resort in the State of Alabama. Const. of Ala. 1901, Sec. 140.

(3) The decision and judgment sought to be reviewed was rendered by the Supreme Court of Alabama on the 15th day of June, 1944. (Rec. Sup. Ct. of Ala., p. 883 et seq.). Application to the Supreme Court of Alabama for

a rehearing was duly and timely filed and was denied by the Supreme Court of Alabama on the 2nd day of November, 1944 (Rec. Sup. Ct. of Ala., p. 905 et seq.). Thus this motion for Leave to Proceed in Forma Pauperis is timely presented.

(4) The date for the execution of the sentence to death of this Petitioner is set for the 12th day of January, 1945, and Executive Reprieve until February 16th, 1945, has been granted by the Governor of Alabama.

Fourth: **The facts upon which this review is sought are briefly stated as follows:**

Petitioner was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama (Jefferson County), on July 6th, 1943, for first degree murder in the death of one Jake Prescott, which indictment consisted of five counts (Rec. p. 1), said indictment filed in open court, and on July 6th, 1943, an order was made and entered by Honorable Geo. Lewis Bailes, one of the Judges of said Court, denying to the petitioner (defendant) the right of bail.

Petitioner made and filed a motion to quash the indictment (Rec. p. 11), which motion was by the trial court overruled (Rec. p. 19).

Petitioner (defendant) was arraigned on said indictment in open court on July 10th, 1943, and entered a plea to said indictment of "not guilty," and "not guilty by reason of insanity."

The cause was set for trial before Honorable John C. Morrow, one of the Judges, Criminal Division, of said Court, for July 19th, 1943. The case was the only case set for trial in said court for the week of July 19, 1943, in which a jury was necessary.

On June 29, 1943, Honorable J. Russell McElroy, Presiding Judge of said Court, drew a venire of 150 persons to appear in said Court on July 19, 1943, and ordered the

Sheriff of said County to summons the said named persons drawn from the jury service in the case of State of Alabama v. Elbert J. Burns, alias E. J. Burns (Rec. pp. 104-7).

This alleged order drawing the venire was not made nor filed in office of the Clerk of the Court, nor entered upon the minutes of the Court before the indictment was returned, nor before the jury was selected and sworn in to try this petitioner (Rec. pp. 104, 105, 107).

Petitioner (defendant) made and filed in open court a motion for an examination as to his sanity (Rec. p. 91½), which motion was overruled and denied by the trial court (Rec. p. 91).

Jurors for service in the Circuit Court of Jefferson County, Alabama, report to what is known as the "jury assembly room," in said court house, which is separate and apart from the court rooms. From the last Saturday in June of each year to the first Monday in October of each year, no cases are set for trial in the Circuit Court of Jefferson County, Alabama, in which a jury is required, and usually only one Judge is on duty.

Robert J. Foster, Chief Clerk to the Clerk of the Tenth Judicial Circuit of Alabama, called as a witness, being duly sworn, testified as follows:

> "Q. (By Mr. Alford): Mr. Foster, in what capacity were you employed in the office of the Clerk of the Circuit Court?
>
> A. Chief Clerk.
>
> Q. How long have you been such?
>
> A. About ten years.
>
> Q. What are your duties as Chief Clerk?
>
> A. General supervision of the office.
>
> Q. You have supervision over the minute entries of the court?
>
> A. Yes, sir.
>
> Q. Does the minute entry of the court show any order signed by any judge of the court for the draw-

ing of a jury on June 29th, to be summoned to appear and serve as jurors in the Circuit Court for the week beginning July 19, 1943?

A. Nothing further than what Judge McElroy testified to, as to this paper which he read (Exhibit No. 1).

Q. That was not copied on the records, and it does not show that it was filed in court, does it?

A. No, sir.

Q. Are you present when the jurors' names are drawn from the general jury box of this county?

A. Yes, sir.

Q. That is part of your duties?

A. Yes, sir. Either Mr. Andrews or myself.

Q. Well, since June 29th, do you of your own personal knowledge know whether there has been any additional number of jurors' names drawn from the box to serve as a special venire beginning say July 26th, 1943?

A. No, sir; there has been none drawn. This was the last that was drawn.

Q. Does that document there show how many were drawn?

A. 150.

Q. Was a copy of that jury list that was drawn on July 29th at any time thereafter served on Elbert J. Burns, the defendant here about to enter on this trial?

A. Not out of our office, no, sir.

The Court: Mr. Alford, you mean a copy of the venire?

Mr. Alford: Yes, sir.

The Court: Why not just admit that it was not?

Mr. Hawkins: We will do that.

Mr. Alford: All right; if you admit it won't put it into the record.

Q. When was a list of those jurors made available to this defendant or his counsel?

A. Well, it would not be available to anybody until this morning after the jury was organized.

Q. Then the defendant had not had a copy of that

jury list served on him until this morning when it became available to the general public?

A. I do not know that a copy was served on him this morning, but that was the first time it was available to anybody to see.

Q. That list, which is now available, does not contain the names of all the jurors whose names were drawn to serve as jurors beginning this morning in this court, does it?

A. No, sir; it does not.

Q. Do you know of your own knowledge how many jurors the list contained?

A. There was 150 summonsed.

Q. How many answered present, if you know?

A. About 62 I think there was.

Q. What was the returns or service on the remainder?

Mr. Hawkins: We object.

The Court: Overruled.

A. There was some not found, and some executed.

Q. Do you know how many were reported not found?

A. I think 33.

Q. How was the service, if you know, undertaken by the sheriff on those jurors?

A. The sheriff does that. We have no knowledge of that. He can either serve them personally or serve them through the post office.

Q. That is under a local act of this county as you understand it?

A. Yes, sir.

Q. Do you know how many of those remaining jurors were excused by the court?

A. No. You take 150, and take 33 out, and I think we had 62 others that answered, and then the judge excused 12 in the court room this morning.

Q. Where did the organization of this jury take place, in this room or where?

A. Room 604, the jury room.

Q. What is the number of this room in which you are testifying now?

A. 617.

Q. The jury room then is about a block from this court room?

A. It is at the end of the hall.

Q. The organization of the jury did not take place in the room where you are now testifying?

A. No, sir.

The Court: Suppose we refer this document, which Judge McElroy read, as State's Exhibit 'A.' (Document so marked.)

The Court: You say there is no endorsement on that paper, showing it was filed?

The Witness: No.

The Court: I will ask if it was filed by the office of the clerk of the court?

The Witness: After Judge McElroy drew those 150 names, we sent copies to the sheriff for them to be served, and they were then wrapped up in that wrapper and locked up in the safe and not opened until this morning when I entered this court room. The cards were wrapped up, and they were locked up in the safe, cards wrapped up and not opened until this morning.

The Court: And now in possession of the Clerk?

The Witness: Yes, sir; since they were drawn on the 29th of June.

Q. They were not entered on the minute entry before they were locked up?

A. No, sir.

Q. And have not been as yet?

A. No, sir.

The Court: Anything else, Mr. Alford?

Mr. Alford: I want to show by the sheriff's office that it is their custom to summons jurors through the United States registered mails in this county, and that when a card is returned by the post office department not found they make the return not found, that they do not make any effort thereafter to locate the jurors.

The Court: Well, if you want any one from the sheriff's office we will get them for you.

Q. Mr. Foster, this morning, as you related, when the jury was organized around in Room 604, and cer-

tain jurors were excused by the court from service this week, was the defendant or his counsel present at that time?

A. No, sir" (Rec. pp. 104-7, incl.).

* * * * * * *

In Jefferson County, the mode of empanelling juries for jury trials is the system prescribed by the Jefferson County jury law, Title 62, Sections 135 et seq., Code of Alabama, 1940.

On the morning of July 19th, 1943, which was Monday of that particular week, the trial Judge, Honorable John C. Morrow, entered the jury assembly room, when neither the defendant nor his counsel was present (defendant being confined in jail), examined the jurors present as to their qualifications for jury service and exemptions from jury duty, and selected from those present 24 men who were then sent to the court room, and from which the State and defendant were required to strike a jury, in the case of State of Alabama v. Elbert J. Burns, alias E. J. Burns.

Petitioner (defendant) made and filed a motion to quash the venire (Rec. pp. 3, 4), consisting of 16 grounds, raising the question of the constitutionality of the Jefferson County jury law **(Secs. 196 to 228, incl., Title 62, Code of Alabama, 1940)**. Two of the grounds—15 and 16—raising the question that said Jefferson County jury law **(Secs. 196 through 228, Title 62, Code of Alabama, 1940)**, is repugnant to the Constitution of the United States, which motion was overruled and denied, defendant reserving an exception to the ruling of the trial court (Rec. p. 6).

Petitioner (defendant) then objected to striking from the venire of 24 men, selected by the trial judge, which objection was overruled, and defendant reserved an exception (Rec. p. 116).

Petitioner (defendant) was tried before a jury of 12 jurors taken from the 24 jurors selected by the trial judge at a time and place when neither the defendant nor his counsel was present, which resulted in a verdict of conviction, the penalty being fixed at death. Sentence being pronounced against the defendant and judgment entered (Rec. pp. 6, 7), fixing the punishment at death.

The jury before whom this defendant was tried was secured pursuant to the provisions of Title 62, Article 18, subdivisions 5 and 6, of the Code of Alabama of 1940, the pertinent sections of Article 18, Title 62, Code of Alabama of 1940, appear as Appendix "A" to the Brief and Argument in support of petition for writ of certiorari, filed in this Court at this time.

It is the contention of the petitioner that Article 18, Title 62, Code of Alabama of 1940, is a local law, since it is specifically declared to be a law applicable in its provisions only to Jefferson County, Alabama, and that the Legislature tyrannically assumed the power denied to them by the Constitution of Alabama in the enactment of a local law without complying with the constitutional provisions with reference thereto. The pertinent sections of the Constitution of Alabama of 1901 appear as Appendix "B" to Brief and Argument in support of petition for Writ of Certiorari filed in this Court at this time.

The matter with which the local jury law of Jefferson County, Alabama, deals, was provided for by the general law of the State of Alabama, being Title 30 of the Code of Alabama, the pertinent sections of which title appear as Appendix "C" to Brief and Argument in support of Petition for Writ of Certiorari filed in this Court at this time.

It is the further contention of this Petitioner that the local law is discriminatory and violative of the equal rights clause of the Constitution of the United States, in

that it discriminates against persons who happen to be tried in Jefferson County, Alabama, in capital cases without any reasonable basis for discrimination and is violative of the due process clause of the 14th Amendment, in that, among other reasons, it forces a defendant to trial upon a capital charge before a jury which is not fairly and impartially selected according to the course of law and affords full opportunity for a jury to be "hand-picked" against a defendant.

Before entering upon the trial, and at the time of the arraignment on July 10th, 1943, the attorney for petitioner and the sister of this petitioner, acting as next friend of petitioner, filed a sworn motion, setting out in great detail facts which they deemed sufficient to require the Court to examine into the sanity of the defendant, before requiring the defendant to plead (Rec. pp. 91½, 92½). This motion, or affidavit, claimed the protection accorded by Title 15, Section 428, Code of Alabama 1940. The Court refused to consider this petition. The Court justified its refusal to consider this petition, or application (by whatever name it may be called), by making the following statement:

> "I have known him for 25 years. There is no use on earth for me to institute an inquiry as to his sanity, and I refuse to do it" (Rec. p. 92).
>
> "I might state that I have known the defendant for many, many years, and there is no reason on earth, occurring to me, why I should delay the trial of this case and inquire into his sanity" (Rec. p. 93).

Thereafter, upon arraignment, defendant, and counsel for defendant, stood mute, and the Court entered a plea for the defendant of "not guilty" (Rec. p. 94).

The case went to the jury on the indictment and the single plea of "not guilty" interposed by the Court for the defendant (Rec. p. 871).

Therefore, the proceedings hereinbefore referred to, with reference to the selection of the jury and the trial, began on July 19th, 1943.

During the course of the trial, in violation of the express terms of the Alabama statute, the trial court, in the presence of the jury, commented on whether or not counsel would put the defendant on the witness stand to testify in his own behalf (Rec. p. 778).

Petitioner (defendant) made and filed in said cause a motion to set aside the judgment and grant to the defendant a new trial (Rec. pp. 19 to 40, inc.), which motion was overruled and denied by the trial court, and the defendant reserved an exception to the ruling of the court (Rec. p. 40).

Petitioner (defendant) appealed from the judgment against him to the Supreme Court of the State of Alabama, which is the highest court in the State of Alabama in which a decision in a cause can be had, and on June 15th, 1944, an opinion was filed in said cause affirming the judgment of the trial court, holding and deciding that the Jefferson County jury law (Secs. 196 to 228, all inc.), **Title 62, Code of Alabama 1940**, was not repugnant to the Constitution of the United States, evading and refusing to decide the question whether the defendant's constitutional rights and guarantees had been denied or invaded by the trial court, in the absence of the petitioner (defendant) or his counsel, entering the jury assembly room, examining veniremen summonsed for jury service in said cause against defendant, excusing a number of them, and selecting 24 from those present from which a jury was selected before whom the defendant was tried and convicted; and, further, evaded or refused to decide whether or not defendant had been denied his constitutional right, guaranteed under Article XIV of the Amendments to the Consti-

tution of the United States, relative to an impartial jury, fairly selected, as an essential element of due process.

The Supreme Court of Alabama based its decision that the Jefferson County jury law was not repugnant to the Federal Constitution on the decision of the United States Supreme Court, in the case of **Gardner v. State of Michigan,** 199 U. S. 325, 50 Law. Ed. 212, 26 Sup. Ct. 106, and under Section 226, Title 62, Code of Alabama of 1940, that defendant was entitled to only 24 jurors from which to strike a jury, citing the case of **Lizzie Stewart v. State of Alabama.** 17 So. (2d) 871, and he was not entitled to more than 24 jurors from which to strike a jury, citing the case of **Lizzie Stewart v. State of Alabama,** supra, and was not entitled to a special venire which right is accorded to defendants in capital felony cases in all other counties in the State of Alabama.

Counsel for Petitioner has read the record and expresses the opinion that there are substantial questions of constitutional law with reference to a proper construction of the due process clause of the XIVth Amendment to the Federal Constitution, and with reference to the proper construction of the equal rights clause of the XIVth Amendment to the Constitution of the United States, and with reference to the guarantee of a fair and impartial trial contained in the Constitution of the United States, within the guarantee of due process contained in the XIVth Amendment to the Constitution, and with reference to a proper construction of the first clause of Section 4, Article IV, of the Constitution of the United States which guarantees to every state in this Union a Republican Form of Government; each of which said constitutional questions were aptly and properly raised and presented to the trial court and to the Supreme Court of the State of Alabama, except the question with reference to the guarantee of a Republican Form of Government, the infringement of

which could not be anticipated prior to the decision of the Supreme Court of Alabama, affirming the judgment of the court below, and, therefore, could not be presented in the State courts, and that by the decisions of the aforesaid State courts, they have given a construction to such constitutional provisions which are probably untenable.

Counsel for petitioner files herewith printed copy of petitioner's petition for writ of certiorari, along with brief and argument in support thereof, which petition for writ of certiorari is duly sworn to as provided by rules of this court, and at the same time, files a certified copy of the Record in the Supreme Court of Alabama, duly certified by the Clerk of the Supreme Court of Alabama, in strict compliance with the statutes and rules of court in such cases made and provided, and files the same in the Supreme Court of the United States before the expiration of the time provided by law for the filing of petitions for writ of certiorari.

Wherefore, the Above Premises Considered, the Petitioner respectfully moves and prays this court for the following relief:

1. That an order be entered in the above cause permitting the same to proceed to a review in the Supreme Court of the United States upon certiorari, *in forma pauperis*, as is provided by law where the applicant is destitute and without funds to prepare and print the necessary papers in connection with the review.

2. That an order be made and entered, directing and commanding, suspension of the execution of the sentence of death pursuant to the judgment of the Supreme Court of the State of Alabama, pending final decision by the Supreme Court of the United States in this proceeding upon petitioner's petition for a writ of certiorari to the Supreme Court of Alabama.

3. And petitioner moves and prays for such other, further, additional or different relief as this Honorable Court will deem just and meet in the premises considered.

ELBERT J. BURNS,

By .....,
G. ERNEST JONES,
Counsel for Petitioner.

.....,
RODERICK BEDDOW,

.....,
HORACE C. ALFORD,
Birmingham, Alabama,
Of Counsel for Petitioner.

United States of America,
State of Alabama,
Jefferson County. } ss.

Horace C. Alford, being duly sworn, says he is of Counsel for the Petitioner named in the foregoing motion, and in the accompanying petition and brief; that he knows the contents of said motion and petition, and that the things therein stated are true to the best of his knowledge, information and belief.

.....,
HORACE C. ALFORD.

Sworn to and subscribed before me this the 18th day of January, 1945.

.....,
FAY M. THOMPSON,
(Seal) Notary Public.

My Commission as Notary Public Expires March 28, 1948.

IN THE SUPREME COURT OF THE UNITED STATES.

..... Term Number .....

Elbert J. Burns, Alias E. J. Burns, Petitioner,

vs.

The State of Alabama.

State of Alabama,
Montgomery County.

Personally appeared before me the undersigned authority in and for said county and state, Elbert J. Burns, who being duly sworn, on oath deposes and says as follows:

I am 63 years of age and I am a white male citizen and resident of the State of Alabama. I was indicted and charged with the crime of first degree murder, in that it was charged that I murdered one Jake Prescott, the indictment being returned against me by the Grand Jury of the Circuit Court of the Tenth Judicial Circuit of Alabama (Jefferson County) on July 6th, 1943, the date of the death of the said Jake Prescott being alleged to have been on some day between the 16th day of January, 1943, and the 18th day of January, 1943, the said Jake Prescott having disappeared and having later been found dead, his body bearing marks of violence indicating death as a result of a felonious assault and battery.

At the time I was arrested and imprisoned I had no money; owned no property, real, personal or mixed, and had no source of income and I have been incarcerated continuously since the date of my arrest, which said arrest occurred prior to the finding and filing of the indictment

upon which I was tried, which said indictment was filed in open court on the 6th day of July, 1943. I have had no income since my incarceration, save and except trifling sums contributed to me by friends and sympathizers for the purchase of tobacco, food and other small comforts during my incarceration. The reason for these contributions having been made being the humane sympathy manifest toward me by certain friends who had faith in my innocence. My wife owns no property so far as my information goes. She is hostile to my interest, having appeared as a witness for the State against me, and I could expect no contribution from her for my defense if she did own property or had income.

I sincerely believe that I am entitled to the relief for which I am praying in my petition for leave to proceed in forma pauperis and for a stay of execution of sentence pending proper preparation of a writ of certiorari, brief and argument in support thereof, and the record of my cause in the Supreme Court of Alabama. I sincerely believe that my constitutional rights, guaranteed to me by the Federal Constitution were infringed in the several particulars set forth in the motion for leave to proceed in forma pauperis which accompanies this affidavit and which I have read, and particularly that I was denied due process of law; that I was denied the equal protection of the laws and that the arbitrary opinion of the Supreme Court of Alabama and supporting an arbitrary exercise of power contrary to the organic law of the State of Alabama constitutes an abandonment of the Republican Form of Government as guaranteed by the Fourth Article of the Constitution of the United States, and I have been assured by a member of the Bar of the Supreme Court of United States, G. Ernest Jones, Esq., of Birmingham, Ala-

bama, that he will proceed with all diligence to a study of the record in my cause and the authorities of law relating thereto and the preparation of brief and argument in support of petition for a writ of certiorari, and have been assured by him that from a reading of the record in said cause he is inclined to the opinion that my contentions heretofore stated are well founded, and I have been assured by the attorney who tried my case in the Circuit Court of Jefferson County and presented my case to the Supreme Court of Alabama that after his most careful study of the questions herein involved, based upon his complete knowledge of the record of the trial of my case in nisi prius court and in the Supreme Court of Alabama, that he entertains an honest, sincere opinion in good faith that my constitutional guarantees have been infringed by the courts of Alabama as hereinbefore recited.

I sincerely and honestly believe in all good faith that I have not had a fair and impartial trial and I sincerely believe in all good faith that my defense was prejudiced by the refusal of the court below to grant me the privilege of selecting a jury pursuant to the General Law of the State of Alabama, and by reason of the innumerable discretionary rulings made by the court adverse to me where the rulings were not made in the exercise of a fair judicial discretion, but amounted to an abuse of judicial discretion, particularly in the denial to me of the right to have an examination into my sanity pursuant to motion made in that respect and to the submission of the cause upon uncorroborated testimony of an accomplice, contrary to the statutes of the State of Alabama in such cases made and provided, and particularly that hostile and prejudicial comment on the part of the trial judge with regard to whether or not I would be called to testify, which comment

was in violation of the Statutes of the State of Alabama and infringed upon my constitutional guarantee that I should not be compelled to incriminate myself.

.....

Elbert J. Burns.

Sworn to and subscribed before me this 2 day of January, 1945.

.....

Tennyson Dennis,

(Seal) Notary Public.

My commission expires ....., 1946.

I, the undersigned attorney of record in the matter of Elbert J. Burns, alias E. J. Burns, vs. The State of Alabama, do hereby certify that I have served a copy of the above and foregoing motion for leave to proceed in forma pauperis upon Hon. Wm. N. McQueen, Acting Attorney General of the State of Alabama, and Attorney of Record for the State of Alabama, addressed to him at his proper post office address, at Montgomery, Alabama, by United States mail with sufficient postage to pay all mailing charges.

This the ..... day of January, 1945.

.....

G. Ernest Jones,
Counsel for Petitioner.

Office - Supreme Court, U. S.
FILED
MAR 2 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 879.

ELBERT J. BURNS, Alias E. J. BURNS,
Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
HORACE C. ALFORD,
All of Birmingham, Alabama,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 879.

ELBERT J. BURNS, Alias E. J. BURNS,
Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes the above named petitioner, Elbert J. Burns, alias E. J. Burns, and presents this his petition for rehearing of the petition for certiorari in this cause.

I.

JURISDICTION.

The petition for certiorari was filed on January 29th, 1945, and was denied on February 5th, 1945. This petition is filed within less than twenty-five days thereafter, under Rule 33 (28 O. S. C. A., Sec. 354).

II.

REASONS FOR PETITION FOR REHEARING.

The basic question in this case is one that has never heretofore been presented to and decided by the Supreme Court of the United States.

1. On reanalysis, it is felt that neither the petition for Certiorari, nor the supporting brief, sufficiently emphasized, or pointed to with sufficient directions, the error of the Supreme Court of the State of Alabama, upon the principal question of Federal law involved, was the controlling factor in the case.

That error lay in the fact that this Court, in fact and in reality, in denying the petition for writ of certiorari, in effect, has ruled contrary to opinions of this Court, holding that, after indictment has been filed in a capital felony case, the defendant is entitled to be personally present at the trial, that is, at every stage of the trial, when his substantial rights may be affected, and if he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Federal Constitution; and this right includes the right to be present when talesmen are examined on their voir dire as to qualifications and excuses.

Was Petitioner Present at Every Stage of His Trial?

Robert J. Foster, Chief Clerk to the Clerk of the Circuit Court, testified as follows:

> "Q. Where did the organization of this jury take place, in this room or where?
>
> A. Room 604, the jury room.
>
> Q. What is the number of this room in which you are testifying now?
>
> A. 617.

Q. Mr. Foster, this morning as you related, when the jury was organized around in Room 604 and certain jurors were excused by the court from service this week, was the defendant in this case or his counsel present at that time?

A. No, sir'' (Rec. pp. 104-7, incl.).

2. A correct ruling, in accordance with the former decisions of the Supreme Court of the United States on that question of general law, must have resulted in a different disposition of the case.

III.

THE CONTROLLING QUESTIONS.

The controlling questions therefore are:

(a) The trial court in entering the jury assembly room, in the absence of the defendant and his attorney in a capital felony case, examining jurors summonsed for jury service in the cause as to their qualifications and excuses; then selecting 24 men from those remaining and requiring the defendant, over his timely objection, to strike a jury from those selected by the Court at a time and place when neither defendant nor his attorney were personally present, deprived the defendant of his constitutional right to be present at every stage of the trial, after indictment filed, when his substantial rights are affected.

(b) A defendant in a capital felony case being convicted by a jury, selected by the trial court at a time and place when the defendant was not personally present, and sentenced to suffer the death penalty, deprived him of his life without due process of law and denied to him the equal protection of the law.

(c) The defendant being forced to strike a jury from 24 men selected by the trial court at a time and place when

the defendant was not personally present, deprived him of the constitutional right to a trial by an impartial jury of the State and District wherein the crime is alleged to have been committed.

IV.

But on that question, the affirmative holding of the Supreme Court of the State of Alabama, is in direct conflict with the applicable decisions of this Court.

V.

PUBLIC IMPORTANCE.

The public has an interest in the life and liberty of every human being, and to the extent no human being shall be deprived of his life and liberty without due process of law, nor denied the equal protection of the law.

VI.

The denial of the application for writ of certiorari to the Supreme Court of Alabama cannot be based upon a failure to present a Federal question. The case of Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674, being a direct holding by the Supreme Court of the United States that the denial of the right of a defendant to be present at every stage of his trial is a denial of a right guaranteed by the Federal Constitution.

VII.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of February 5th, 1945, denying the petition for writ of certiorari be revoked; and that the writ of certiorari issue.

And petitioner further respectfully shows that this question is not moot, the Governor of Alabama having reprieved this defendant by Executive Order postponing execution of this sentence until the 23rd day of March, 1945.

ELBERT J. BURNS,

By .....,
G. ERNEST JONES,
Birmingham, Ala.,
Counsel for Petitioner.

.....
RODERICK BEDDOW,

.....
HORACE C. ALFORD,
Birmingham, Ala.,
Of Counsel for Petitioner.

United States of America,
State of Alabama,
Jefferson County. } ss.

I, Horace C. Alford, of Counsel for the Petitioner, Elbert J. Burns, alias E. J. Burns, being duly sworn, certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Horace C. Alford.

Sworn to and subscribed before me this the 28. day of February, 1945.

Foy M. Thompson,
Notary Public.

My commission expires 3-28-48.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 879.

ELBERT J. BURNS, Alias E. J. BURNS,
Petitioner,

vs.

THE STATE OF ALABAMA.

BRIEF AND ARGUMENT

On Petition for Rehearing of Denial of Petition for Writ of Certiorari.

The former Mr. Chief Justice Hughes, in his able work on Federal procedure, says the granting of the writ of certiorari is purely a matter of sound judicial discretion of the United States Supreme Court; that upon petitions for certiorari to State Courts the United States Supreme Court is only concerned with Federal questions. He further says that many attorneys in the preparation of the petition and brief make the error of loading the brief down with argument of State questions, and that the United States Supreme Court is a very busy Court and that if briefs are loaded down with arguments, largely

upon State questions and matters, not within the jurisdiction of the United States Supreme Court, that Court may inadvertently overlook the Federal question, if there is any, and deny the writ.

We content ourselves here with presenting one basic Federal question in this case, and that is whether or not the constitutional rights of the petitioner has been invaded by the trial court entering the jury assembly room, in the absence of petitioner and his attorney, examining the talesmen summonsed in the case against petitioner, excusing a large number of them, and then selecting twenty-four men from those remaining and requiring petitioner to strike from that twenty-four in selecting a jury; and whether or not such conduct resulted in depriving defendant of his life and liberty without that due process of law which is the concept of justice. This is the basic question in this case. It was raised in the trial court. It was presented to the Supreme Court of Alabama on appeal in this cause by assignment of error and argument in brief, but the Supreme Court of Alabama, apparently, in its zeal to hold the Jefferson County jury law constitutional, has ignored this basic error, or has decided it was not in conformity with decisions of this Court.

The Federal question involved is whether the petitioner has been denied his constitutional rights, when the trial judge entered the jury assembly room at a time and place when the petitioner or his attorney was not present, examined the talesmen summonsed for jury duty in the cause, excused a large number of them, and selected from those remaining twenty-four talesmen, of the court's own choosing, and requiring the defendant to strike from that twenty-four talesmen in the selection of the jury by whom the defendant was tried; and whether, the defendant having been so convicted and sentenced to suffer the death penalty, his life and liberty has been deprived of him

according to that due process of law required by the Federal Constitution.

The testimony of Mr. Robert J. Foster (Rec. pp. 104 to 107, incl.) shows conclusively that the defendant or his attorney was not personally present when the trial court went into the jury assembly room, examined the talesmen whom had been summonsed for jury duty in the cause against this petitioner, excused a large number of them and selected from those remaining twenty-four men from which a jury was subsequently selected. The testimony of Mr. Foster further shows a copy of the venire was not served on the defendant and he had no knowledge of the identity of those drawn and no possible way for him to protect himself against a "stacked" or "handpicked" jury.

The crime charged against this petitioner was a very atrocious one and necessarily public feeling was high.

PROPOSITION OF LAW.

I.

"A defendant on trial in capital felony cases must be personally present at every stage of the trial after indictment filed when anything is done which may affect his substantial rights, and he cannot waive that right."

Hopt v. Utah, 110 U. S. 579, 25 L. Ed. 265;
Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011;
Lee v. State, 13 So. (2d) 583, 244 Ala. 401;
Ridder v. Commonwealth, 216 Ky. 220, 287 S. W. 704;
Percer v. State, 118 Tenn. 765, 103 S. W. 780;
State v. Hughes, 2 Ala. 102, 32 Am. Dec. 411;
Noell v. Commonwealth, 135 Va. 600, 115 S. E. 679, 30 ALR 1345;
23 C. J., Sec. 973;
Fina v. U. S., 46 Fed. (2d) 643;
Buckhalter v. N. Y., 319 U. S. 426, 87 L. Ed. 1493;
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;
Chambers v. Florida, 209 U. S. 227, 84 Law Ed. 716;
Ashcraft v. Tennessee, 64 Sup. Ct. Rep. 921, 322 U. S. 143;
Smallwood v. State, 235 Ala. 425, 179 So. 217;
Original Brief and Argument on Original Submission, pp. 29-37;
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674.

In the case of **Hopt v. Utah**, 110 U. S. 579, 25 L. Ed. 265, the United States Supreme Court held that a defendant on trial in a capital felony case must be personally present at the trial and the trial commences at least from the moment when the work of empaneling the jury begins; and if the defendant is deprived of his life or liberty without being personally present, such deprivation was without that due process of law required by the Federal Constitution.

Then, following the Hopt case, supra, the United States Supreme Court, in the case of **Lewis v. United States**, 146 U. S. 370, 36 L. Ed. 1011, reaffirmed what was said in the Hopt case, and used the following language:

> "Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of it, when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being present, such deprivation would be without that due process of law required by the Constitution."

In the case of **Snyder v. Massachusetts**, 291 U. S. 97, 78 L. Ed. 674, the United States Supreme Court held the jury viewing the scene of the homicide, when no evidence is taken, the personal presence of the defendant is not necessary, it not being any part of the trial. In that case, Mr. Justice Roberts wrote a very strong dissenting opinion which was concurred in by Mr. Justice Brandeis, Mr. Justice Sutherland and Mr. Justice Butler. Mr. Justice Roberts quoted from the Hopt case, supra, as follows:

> "Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

A jury is a component part of the Court in the trial of men charged with the commission of crime. Mr. Justice

Harlan said in the decision of the Lewis case, supra, the trial commences at least from the time when the work of empaneling a jury begins. This same language was used in the Hopt case, supra.

The empaneling of the jury in the present case actually began when the trial court entered the jury assembly room, examined the talesmen as to their qualifications, excused a large number of them, and selected twenty-four men from those left from which a jury was subsequently struck, and before whom petitioner was tried and convicted. The law is that the record must affirmatively show that the accused was personally present at every stage of the proceedings against him, and it has been held that where the record shows he was personally present upon arraignment, the presumption is that he was present throughout the trial unless the contrary is affirmatively shown. We submit the contrary is shown in this case, because the testimony of Mr. Robert J. Foster, chief clerk to the Clerk of the Circuit Court, who was present in the jury assembly room when the judge entered the jury assembly room, examined the talesmen on their voir dire, excused a number of them, and selected the twenty-four from which the jury was subsequently struck, testified positively that the defendant was not present when that proceeding took place (Rec. pp. 104-107).

Of course, the decisions of State Courts are not binding upon this Court, but in the case of **Lee v. State,** 13 So. (2d) 583, a case in which the verdict of the jury was rendered in the absence of the defendant, the Court of Appeals of Alabama held that the constitutional rights of the defendant had been invaded, or had been denied, citing the Hopt and Lewis cases, supra. That Court also cited the case of **Ridder v. Commonwealth,** 216 Ky. 220, 287 S. W. 704; **Percer v. State,** 118 Tenn. 765, 103 S. W. 780. In the Lee case, supra, the trial had concluded; nothing was to be done but for the jury to return the verdict—the

jury had been empaneled, had heard all of the testimony, the charge of the court, but the court says he was denied his constitutional rights basing its holding on the holding of this Honorable Court in the Hopt and Lewis cases, and, of course, citing others. The judgment in the Lee case, supra, was reversed by the Court of Appeals of Alabama, and reached the Supreme Court of Alabama by petition for writ of certiorari (244 Ala. 401, 13 So. [2d] 590), and the opinion of the Court was written by Mr. Justice Foster. He says in the opinion, among other things, that the defendant has the right to poll the jury to ascertain whether all of them agreed upon the verdict. He further says that the right of the defendant to be present when the verdict is returned by the jury is guaranteed by Section 6 of the Constitution of Alabama; that he may discuss questions of law and fact which may arise with the Court, and that he may examine the jury by the poll to ascertain if they assented, citing the case of State v. Hughes, 2 Ala. 102, 32 Am. Dec. 411. If it be important that the defendant in a capital felony case shall be personally present when the jury returns its verdict in open court, how much more important should it be that a defendant on trial for his life in a capital felony case should personally be present when the jury is empaneled, that is, when the empanelling of the jury begins? If a jury is selected who may be biased or prejudiced, it is certain that the defendant cannot have a fair and impartial trial. It may be said in reference to the Hopt case, supra, there was a mandatory statute in Utah which required that a defendant on trial in a capital felony case shall personally be present at the time of examination of talesmen by the triers of the Court. Alabama is a common law state and murder is a common law crime. Alabama has adopted the common law (Title 1, Section 3, Code of Alabama 1940), and at the common law, a defendant put on trial for murder, or any other capital offense, must be personally pres-

ent at every stage of the trial when his substantial rights may be affected. The Court of Appeals of Alabama, in the Lee case, supra, quotes with approval from the case of **Noell v. Commonwealth**, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345, to the effect:

> "The public has an interest in every case involving the life or liberty of a citizen both in England and in this country, and it has long been recognized as a settled rule of the common law, based as well upon public policy as upon the interest of the accused, that his continuous presence from arraignment to sentence is an essential part of the process of law provided for his trial, and without which the courts have no jurisdiction to pronounce judgment upon him. Constitutional provisions and statutory enactments not in conflict with such provision may modify or abrogate this general rule, but in the absence of constitutional or statutory change—and there is none as to felony in Virginia (nor in Alabama)—conformity to the rule is essential to jurisdiction and the accused cannot waive it."

In 23 Corpus Juris Secundum, Section 973, the general rule is stated:

> "In the absence of a permissible waiver, see Section 974a infra, under constitutional or statutory provisions to that effect to the common law, an accused charged with a felony is entitled to be present, and, for a valid trial and conviction, must be present at every stage of the trial, or at least when any important step is taken."
>
> "While this rule is regarded in most jurisdictions as essential for the benefit of the accused, it has been held in other jurisdictions that the rule is for the benefit of the State as well as the accused, and that accused's presence during the trial is essential to the jurisdiction of the court."

The record must affirmatively show that the accused was personally present at the trial, and if the record shows

he was personally present at arraignment, the presumption is he was personally present at every stage of the trial thereafter, unless the contrary is shown by the record.

In this case, it is affirmatively shown by the testimony of Mr. Foster the accused was not personally present when the jury was interrogated upon voir dire when certain jurors were excused and twenty-four selected from those remaining from which a jury was selected.

In the case of **Fina v. U. S.**, 46 Fed. (2d) 643, the defendant was on trial for a felony. The jury was unable to agree and desired to ask the trial judge a question. In the absence of the defendant or his attorney, the trial judge allowed the jury to be brought into court and the judge answered their question. The Circuit Court of Appeals reversed the judgment of the trial court and said:

> **"We have no doubt but that it is the constitutional right of one accused of a felony to be present at every stage of the trial, because the trial by jury mentioned in our Constitution means a trial by jury according to the common law."**

And further that Court says:

> **"Again, the error here complained of is a denial to a defendant of his constitutional right, and the denial to a defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial. To prevent such rights from usurpation, the framers of our Constitution deemed them of such solemn importance in the doing of justice as to place their protection under the sheltering aegis of our organic law."**

It probably would not be amiss for us to tell this Honorable Court how juries are selected and empaneled in Jefferson County, Alabama. When the court is in session and engaged in the trial of jury cases, all jurors sum-

monsed for the week are assembled in a large jury assembly room and apart from the several court rooms. One of the judges goes into the jury assembly room and all jurors are sworn to answer such questions as may be propounded to them touching their qualifications, etc., and those who may be disqualified, or for any other cause, The excused. names of the remaining jurors are written or printed on small slips of paper and all the slips placed in a small jury box and securely locked. Each judge has a key to the box which is carried from one court room to another, and when a case is assigned to a judge for trial the jury box is brought into court, and in the presence of the parties and their attorneys, the judge draws twenty-four names from the jury box and the bailiff of the court is sent to the jury assembly room to bring them into court. The judge then tells the jury the nature of the case, the names of the parties, their attorneys, etc., asks the jurors a few preliminary questions touching their qualifications in the particular case and pronounces them qualified. When the court has pronounced the jurors qualified, he then says to the attorneys for the parties to begin to strike. Defendants charged with capital offenses, and with other offenses, never know the identity of jurors excused or the reason for them being excused. A trial judge has the right, if he sees fit, to excuse any number of jurors not in the presence of the defendant or his attorney, and without cause, and the defendant may never know anything of it.

On July 19th, 1943, the present case was the only one for trial in which a jury was necessary. There was no necessity for the small jury box being used. The trial judge entered the jury assembly room, excused a number of jurors and selected twenty-four from those remaining and had them brought into open court where the defendant and his attorney was present and required them to

strike from that twenty-four jurors. The record clearly shows the defendant objected to striking from the twenty-four jurors selected by the trial court, but his objection was overruled and he reserved an exception.

This case is unlike the case of **Buckhalter v. New York**, 319 U. S. 426, 87 L. Ed. 1493. In that case it was contended due process was denied by the court's ruling on challenges to certain jurors. This court held such rulings raised no question of due process of law. In this case the action of the court goes to the very root of the concepts of justice—the selection and empaneling of the jury. The trial court had the opportunity, if it saw fit, to give the defendant a "stacked" or "handpicked" jury. This Honorable Court does not know what went on in the jury assembly room, and neither does the defendant, because the defendant or his attorney was not present.

The United States Supreme Court in the Hopt and Lewis cases, Mr. Justice Roberts, in his able dissenting opinion in the Snyder case, supra, has held, if a party on trial in a capital felony case is deprived of his life or liberty, when he is not personally present at every stage of the trial, when his substantial rights may be affected, such deprivation is without that due process of law required by the Constitution. The U. S. Circuit Court of Appeals, in Fina v. United States, supra, has reaffirmed that particular doctrine.

In the case of **Powell v. Alabama**, 287 U. S. 45, 77 Law. Ed. 158, the United States Supreme Court held to appoint counsel for an indigent person charged with a capital felony offense and not allowed opportunity for adequate investigation and preparation if his life or liberty is deprived under such circumstances, such deprivation is not according to due process of law required by the Constitution.

Until the last few years, not much importance was given to a conviction in a capital case secured on a confession

coerced from the defendant, but in the case of **Chambers v. Florida**, 209 U. S. 227, 84 L. Ed. 716, and the case of **Ashcraft v. Tennessee**, 64 Sup. Ct. Rep. 921, 322 U. S. 143, and others, this court has held such judgment of conviction is not in accordance with due process of law. In discussing the term "due process of law" this Court has said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concepts of justice."

In a case such as this one, the jury is the principal factor in the trial, and if the court enters the jury assembly room when neither the defendant nor his counsel is present, examines the jurors present, excuses a number of them, and selects twenty-four men from those remaining, and requires the defendant to strike from them in the selection of a jury, it is inconceivable how this court or any other court can say his constitutional rights have not been invaded; and if convicted, his life or liberty has been taken by due process of law, which satisfies the concepts of justice.

A judge in the Circuit Court of Jefferson County, Alabama, may exercise a personal favor or privilege, excuse as many jurors as he sees fit and select from those present twenty-four men of his own choosing. All of this may be done in the absence of the defendant to be tried for his life or liberty and there is nothing he can do about it.

We wish it understood we intend no personal reflection upon the moral integrity of the trial judge whose action is here under review. This affords a condition which is fundamentally dangerous and the Alabama Supreme Court has elected not to speak out upon it, although the question was put squarely up to that court by assignments of error and briefs in this case.

In Jefferson County, Alabama, a defendant to be tried upon indictment for a capital felony has no opportunity to

satisfy himself he will get a fair and impartial jury whether he is guilty or innocent. The trial judge has the right to enter the jury assembly room in the absence of the defendant or his attorney, excuse all jurors except twenty-four, which the trial judge may choose to select, and require the defendant to strike from those selected by the trial judge. Perhaps, if twelve of those selected by the trial judge are stricken off, twelve will be left who will convict no matter what the testimony may be.

Mr. Justice Black, in opinion written for the court, in **Chambers v. Florida**, supra, used the following language:

> "Thus, as assured against ancient evils, our Country, in order to preserve the 'Blessings of Liberty,' wrote into the basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process has been obeyed."

Can it be said, if the trial court enters a jury assembly room, in the absence of the defendant and/or his counsel, and selects twenty-four jurors of his own choosing, twelve of whom are to be stricken off, leaving twelve, who probably may be hostile to the defendant, if the defendant is convicted and sentenced to suffer the penalty of death, that his life has been deprived of him by that due process of law which bears the concepts of justice? The murder in this case was a very atrocious crime and public sentiment naturally was high. Can it be said the procedural safeguards of due process of law has been obeyed and that the petitioner has had a fair trial? The petitioner was convicted upon the testimony of a self-confessed convict, who claimed to be an accessory, whom the record in this case shows has served several terms in the penitentiary. The record further shows that the petitioner did not testify in his own behalf.

In **Smallwood v. State**, 235 Ala. 425, 179 So. 217, the Alabama Supreme Court held:

> "In a capital case, refusal to have excuses from jury service heard and determined at time of the trial, in the presence of the accused, so that he may know the facts on which excuse is based, and be heard with respect thereto and excepts to the ruling, is reversible error."

That a Federal question is here presented is clearly held by both the minority and majority opinions in the case of Snyder v. Massachusetts, supra.

Conclusion.

It is conclusive to our minds the constitutional rights of this petitioner have been invaded and he has been convicted without that due process of law guaranteed by the Federal Constitution. It should not be a question with this Court whether the petitioner is guilty or innocent, but whether he has had the constitutional procedural "due process of law" guaranteed to him by the Federal Constitution. To our way of thinking, this Court has declared the law applicable to this case in the opinion of the Court in the Hopt and Lewis cases, supra, and in the dissenting opinion in the Snyder case, supra. The United States Circuit Court of Appeals in the Fina case, supra, has followed the Hopt and Lewis cases, and has declared the law as we believe applicable to this case. We have confidently relied upon the opinion in the Hopt and Lewis cases, supra, as well as in the Snyder and Fina cases, supra, both in the Alabama Supreme Court and in this Court.

We respectfully and sincerely submit this petition should be granted, the order entered on February 5th, 1945, denying the writ should be vacated and an order entered granting the writ.

Respectfully submitted,

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G. ERNEST JONES,
Counsel for Petitioner.

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RODERICK BEDDOW,

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HORACE C. ALFORD,
Of Counsel for Petitioner.

I, G. Ernest Jones, the undersigned attorney of record in the matter of Elbert J. Burns, alias E. J. Burns v. The State of Alabama, do hereby certify that I have served a copy of the foregoing petition for rehearing and brief and argument in support thereof upon Hon. Wm. N. McQueen, Acting Attorney General of the State of Alabama, and Attorney of Record for the State of Alabama, addressed to him at his proper post office address, at Montgomery, Alabama, by United States mail with sufficient postage to pay all mailing charges.

This the .... day of February, 1945.

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G. Ernest Jones,
Counsel for Petitioner.